FILE COPY

OCT 15 197

S. ROBERT SEAY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-288

MELVIN B. LAIRD, SECRETARY OF DEFENSE, *et al.*,

Petitioners,

—v.—

ARLO TATUM, *et al.*

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

FRANK ASKIN
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
American Civil Liberties
Union Foundation
156—5th Avenue
New York, N. Y. 10010

HOPE EASTMAN
1424—16th Street, N.W.
Washington, D. C. 20036

Attorneys for Respondents

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
1. Proceedings in the Courts Below	3
2. Facts in the Summary Record Made in the District Court	4
WHY THE WRIT SHOULD BE DENIED	
I. The Incomplete Record in This Case and the Lack of Finality of the Judgment Below Require That the Petition for a Writ of Certiorari Be Denied	15
II. In Addition to the Fact That the Record Is Inadequate to Warrant a Grant of Certiorari, the Court Below Was Correct in Concluding That Plaintiffs' Claim Was Justiciable and That Plaintiffs Had the Requisite Standing to Sue	17
A. Plaintiffs' Claim Is Justiciable	17
B. The Plaintiffs Have Standing to Sue	24
CONCLUSION	30

PAGE

Table of Authorities

Cases:

ACLU v. Westmoreland, 70 Civ. 3191 (Ill. 1970), appeal docketed *sub nom.* ACLU v. Laird, 71 Civ. 1159 (7th Cir. 1971) 11
American Construction Company v. Jacksonville, T. & K. W. R. Co., 148 U.S. 372 (1893) 16
Anderson v. Sills, 56 N.J. 210, 265 A.2d 687 (1970) 25, 27

Baker v. Carr, 369 U.S. 186 (1962) 24
Bates v. City of Little Rock, 361 U.S. 516 (1960) 26, 29
Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D. N.Y. 1968) 23
Board of Education v. Allen, 392 U.S. 236 (1968) 17
Brotherhood of Locomotive Firemen v. Bangor Aroostook R.R., 389 U.S. 327 (1967) 16

Carolene Products Co. v. United States, 323 U.S. 18 (1944) 10-11
Charge to Grand Jury, In Re, 62 F. 828 (D. Ill. 1894) .. 29
Clark v. Uebersee Finanz Korporation, 332 U.S. 480 (1947) 4
Cole v. Young, 351 U.S. 536 (1955) 30

Davis v. Ichord, 442 F.2d 1207 (D.C. Cir. 1970) 23
Dombrowski v. Pfister, 380 U.S. 479 (1965) 18, 20

Flast v. Cohen, 392 U.S. 83 (1968) 24, 25
Freedman v. Maryland, 380 U.S. 51 (1965) 27

Golden v. Zwickler, 394 U.S. 103 (1969) 18

PAGE

Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251 (1916) 16
Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) 22-23
Herndon v. Lowry, 301 U.S. 242 (1937) 29

Johnson v. Massachusetts, 390 U.S. 511 (1968) 16
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 4, 19, 27, 28

Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) 16

Lamont v. Postmaster General, 381 U.S. 301 (1965) .. 19, 22, 23
Local 309, United Furniture Workers of America v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) 23
Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961) 26

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941) 18
Massachusetts v. Painten, 389 U.S. 560 (1968) 16

NAACP v. Alabama, 357 U.S. 449 (1958) 20, 22, 25, 26, 29
NAACP v. Button, 371 U.S. 415 (1963) 22, 27
NSA v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) 18, 19, 21, 22, 24, 25

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 20
Powell v. McCormack, 395 U.S. 486 (1969) 23
Presser v. Illinois, 116 U.S. 252 (1886) 29

PAGE

Reed Enterprises v. Corcoran, 354 F.2d 519 (D.C. Cir. 1965) 18
Schneider v. Smith, 390 U.S. 17 (1968) 29, 30
Shelton v. Tucker, 364 U.S. 479 (1960) 20, 26
Sparrow v. Strong, 3 Wall. 97 (1866) 11
Stamler v. Willis, 415 F.2d 1365 (D.C. Cir. 1969), *cert. denied, sub nom.* Ichord v. Stamler, 399 U.S. 929 (1970) 23
Straut v. Calissi, 293 F.Supp. 1339 (D.N.J. 1968) 23, 27
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 26, 27

Talley v. California, 362 U.S. 60 (1960) 20, 22

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 18, 19
United States v. O'Brien, 391 U.S. 376 (1968) 20
United States v. Robel, 389 U.S. 258 (1967) 23

Wadsworth v. Queen of Spain [1851] 17 Q.B. 171 24
Wainwright v. New Orleans, 392 U.S. 598 (1968) 16
Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967) 20, 22, 24

Constitutional Provisions:

United States Constitution

Article III 2
First Amendment 2, 3, 18, 20, 23, 24, 25, 27
Fourth Amendment 3
Ninth Amendment 3

PAGE

Statutes:

10 U.S.C. §331 28
10 U.S.C. §332 28
10 U.S.C. §333 ..... 28, 29
10 U.S.C. §334 28
18 U.S.C. §592 28
18 U.S.C. §593 28
28 U.S.C. §1254(1) 2
50 U.S.C. §191(b) 29

Other Authorities:

Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970) 23

Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) 24

117 CONG. REC. S7313 (daily ed. May 19, 1971) 11

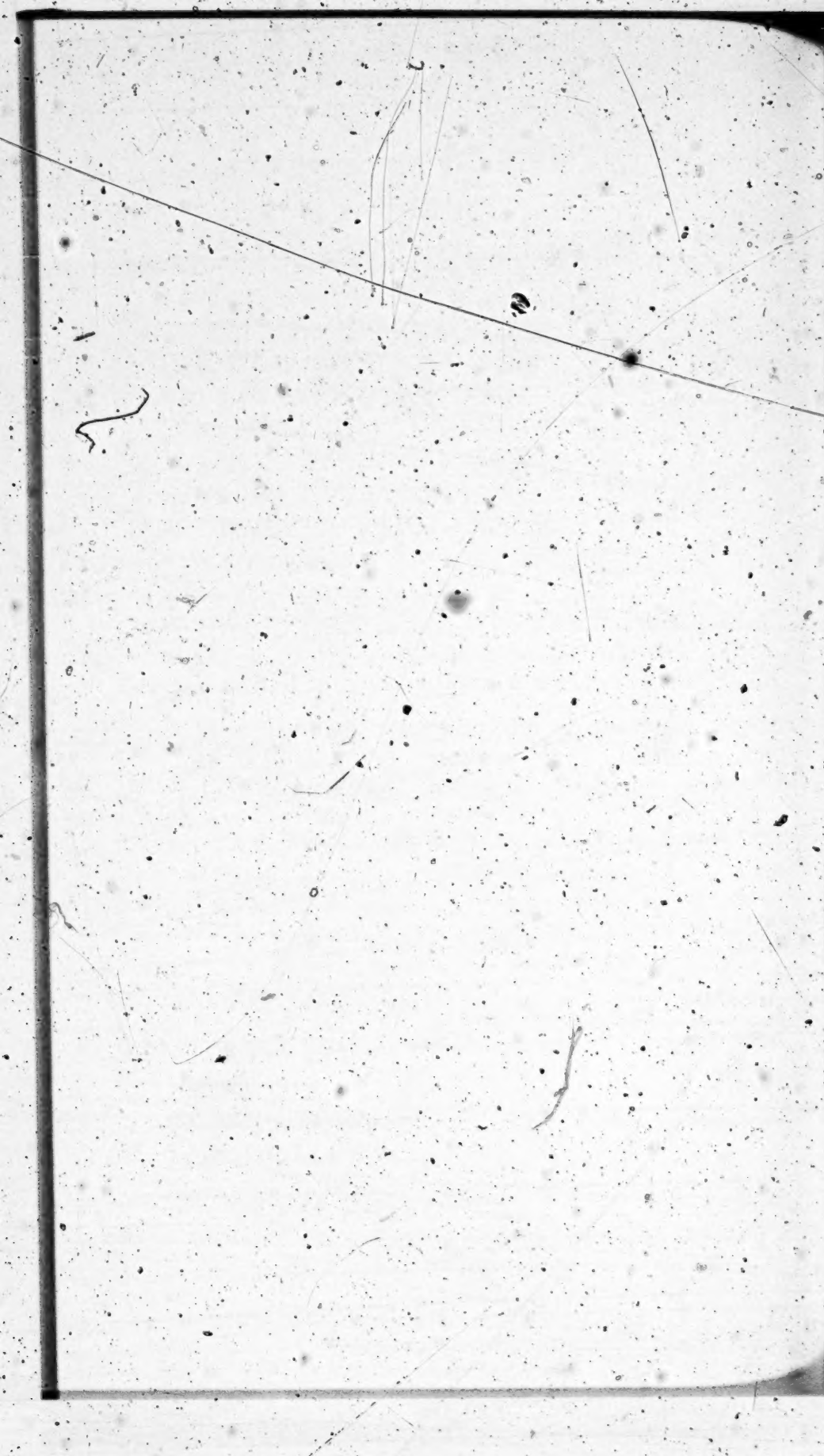
117 CONG. REC. S7315-18 (daily ed. May 19, 1971) 11

Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 451 (March 1966) 24

Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961) 24

Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969) 23

Stern and Gressman, SUPREME COURT PRACTICE 180 (4th ed. 1969) 16



In the

Supreme Court of the United States

October Term, 1971

No. 71-288

Melvin B. Laird, Secretary of Defense, *et al.*,

Petitioners,

—v.—

Arlo Tatum, *et al.*

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Plaintiffs Arlo Tatum, *et al.*, by their attorneys, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, Petition for Certiorari)[1] is reported at 444 F.2d 947 (D.C. Cir. 1971). The opinion of the district court (App. C, Petition for Certiorari) is not reported.

---

[1] All citations hereinafter to the opinion below are to Appendix A to the Petition for Certiorari.

Jurisdiction

The judgment of the court of appeals was entered on April 27, 1971. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to August 25, 1971. The Clerk of the Supreme Court extended the time for filing a brief in opposition to a writ of certiorari until October 15, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the lack of finality of the judgment below, remanding the case to the district court for a factual determination of the constitutional issues presented, requires that the petition for a writ of certiorari be denied at this premature stage of the litigation.

2. Whether the court of appeals was correct in holding that plaintiffs' claim—that unauthorized and extensive surveillance by the United States Army of constitutionally protected civilian political activity places an unconstitutional burden on plaintiffs' exercise of their First Amendment rights—was justiciable under Article III and that plaintiffs had standing to sue.

Statement of the Case

The petitioners' Statement of the Case neglects to mention the facts in this case. The facts, insofar as they are known at this stage of the proceedings, are central to the question whether certiorari should be granted. We therefore set them out in some detail.

On February 17, 1970, plaintiffs,[2] on behalf of themselves and others similarly situated, instituted this action challenging the constitutionality of the surveillance of lawful civilian political activity by the United States Army. Their complaint alleged that the Army's intelligence operations in the civilian community are unauthorized and unnecessary, inhibit political participation and debate by civilians, and deprive plaintiffs and others similarly situated of the rights of free speech and association, the right to petition their government for redress of grievances, and the right of privacy, guaranteed by the First, Fourth, and Ninth Amendments to the Constitution.

1. Proceedings in the Courts Below.

Plaintiffs filed a motion for a temporary restraining order and preliminary injunction on March 12, 1970, requiring the defendants to discontinue the surveillance complained of and to deliver to the court *in camera* copies of all domestic intelligence records which the defendants claimed to have ordered destroyed. The application for a restraining order was denied on March 13, 1970. On April 22, 1970 plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction. The court, however, denied plaintiffs' request to proceed with evidence and witnesses and their motion for a preliminary injunction, and granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Plaintiffs appealed the dismissal and on April 27, 1971 the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Wilkey in which he was joined by Judge Tamm, reversed

[2] Respondents are referred to as plaintiffs throughout this brief.

and remanded the case to the district court for full evidentiary proceedings to determine: (1) the nature of the Army domestic intelligence system; (2) what part of the Army domestic intelligence system is unrelated to or not reasonably necessary to the performance of the Army's statutory and constitutional mission; (3) whether the existence of any overbroad aspects of the system has or might have an inhibiting effect on the plaintiffs and others similarly situated; and (4) what relief is called for in accordance with the evidence.

2. Facts in the Summary Record Made in the District Court.[3]

This case is here solely on motion papers. The complaint and the affidavits and exhibits in support of plaintiffs' motion for a preliminary injunction state that the plaintiffs are citizens and organizations whose constitutionally protected political activity has been the subject of direct and indirect, overt and covert surveillance by intelligence agents and intelligence units of the United States Army. The nature of this surveillance, and the way in which it encompasses the political and social activities of the plaintiffs and other individuals and organizations similarly situated, consists of military intelligence reports (Exhibit A to plaintiffs' complaint) and statements made by a former Army captain in military intelligence (Exhibit B to plaintiffs' complaint), some of which were confirmed by officials in the Department of Defense (Exhibit D to the plaintiffs' complaint; Exhibits A, B, H and I to Speiser Affidavit). The

[3] All the facts related here were before the District Court upon its dismissal of plaintiffs' complaint. They must of course be taken as true in face of the defendants' motion to dismiss. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951); *Clark* v. *Uebersee Finanz Korporation*, 332 U.S. 480 (1947).

evidence before the district court can be summarized as follows: (1) the Army has approximately 1,000 plainclothes intelligence agents stationed in 300 offices throughout the United States; (2) these agents intrude themselves into civilian politics by monitoring and reporting the constitutionally protected political activities and associations of civilians; (3) the Army Intelligence Command has maintained a computerized data bank on political protests and the persons and organizations participating in them; (4) the same Command has published an "identification list," sometimes with photographs, of persons present at political rallies and public assemblies, and (5) Army intelligence agents have conducted undercover operations within the civilian community.

A. *Surveillance of the Plaintiffs and Others Similarly Situated.* Exhibit A to the plaintiffs' complaint is a document entitled, "USAINTC WEEKLY INTELLIGENCE SUMMARY NUMBER 68-12," containing "items of intelligence interest for the period 0600 hrs, Monday, 11 March 68 to 0600 hrs, Monday 18 March 68." This document is a report of constitutionally protected political activities of plaintiffs and others similarly situated, and, upon information and belief, is representative of similar such reports prepared weekly by military intelligence units, distributed to civilian and military officials within the Department of Defense and to each intelligence unit and troop command in the Continental United States as well as Army headquarters in Europe, Alaska, Hawaii and Panama,[4] and filed

[4] Exhibit A is expressly directed to: "CG FIRST ARMY (THRU 109TH MI GP); CG, THIRD ARMY (THRU 111TH MI GP); CG FOURTH ARMY (THRU 112TH MI GP); CG, FIFTH ARMY (THRU 113TH MI GP); CG, SIXTH ARMY (THRU 115th MI GP); CG, XVIII ABN CORPS; CG, III CORPS

in one or more data banks in the Department of the Army. Typical of the reports concerning the activities of individual plaintiffs are the following:

FRIDAY, 15 MARCH 1968:

PHILADELPHIA, PA.: A. *THE PHILADELPHIA CHAPTER OF THE WOMEN'S STRIKE FOR PEACE* SPONSORED AN ANTI-DRAFT MEETING AT THE FIRST UNITARIAN CHURCH WHICH ATTRACTED AN AUDIENCE OF ABOUT 200 PERSONS. *CONRAD LYNN,* AN AUTHOR OF DRAFT EVASION LITERATURE, REPLACED YALE CHAPLAIN WILLIAM SLOANE COFFIN AS THE PRINCIPAL SPEAKER AT THE MEETING. FOLLOWING THE QUESTION AND ANSWER PERIOD ROBERT EDENBAUM OF THE *CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS* STATED THAT MANY PHILADELPHIA LAWYERS WERE ACCEPTING DRAFT EVASION CASES. THE MEETING ENDED WITHOUT INCIDENT.

B. *REV. ALBERT CLEAGE, JR.,* THE FOUNDER OF THE BLACK CHRISTIAN NA-

---

(THRU DCSI FOURTH ARMY); CG, MDW (THRU 116TH MI GP); CG, 1ST ARMD DIV (THRU DCSI FOURTH ARMY); CG, 2D ARMD DIV (THRU DCSI FOURTH ARMY); CG, 82D ABN DIV (THRU XVIII ABN CORPS); CG, 5TH INF DIV (THRU DCSI FIFTH ARMY); CG, USARHAW (THRU 710TH MI DET); CG, FT DEVENS (THRU 108TH MI GP); CO, 902D MI GP (THRU 116TH MI GP); CO, 108TH MI GP; CO, 109TH MI GP; CO, 111TH MI GP; CO, 112TH MI GP; CO, 113TH MI GP; CO, 115TH MI GP; CO, 116TH MI GP; CO, 710TH MI DET; DIRECTOR ANMCC (PASS TO DIA ELEMENT); USAINTC LNO, PENTAGON." Eleven other recipients are indicated by code.

TIONALIST MOVEMENT IN DETROIT, SPOKE TO AN ESTIMATED 100 PERSONS AT THE EMMANUEL METHODIST CHURCH. CLEAGE SPOKE ON THE TOPIC OF BLACK UNITY AND THE PROBLEMS OF THE GHETTO. THE MEETING WAS PEACEFUL AND POLICE REPORTED NO INCIDENTS.

MONDAY, 18 MARCH 1968:

PHILADELPHIA, PA.: MEMBERS OF THE *VIETNAM WEEK COMMITTEE* COMPOSED LARGELY OF PROFESSORS AND STUDENTS OF THE UNIVERSITY OF PENNSYLVANIA, WILL CONDUCT A "SLEEP-IN" TO PROTEST THE SCHEDULED APPEARANCE OF THE DOW CHEMICAL COMPANY RECRUITERS ON CAMPUS. THE NEXT DAY, 19 MARCH, THE SAME ORGANIZATION WILL SPONSOR A PROTEST RALLY ON CAMPUS. [emphasis added to indicate individual plaintiffs].

Others similarly situated are named in additional reports contained within Exhibit A:

MONDAY, 11 MARCH 1968:

HARTFORD, CONN.: APPROXIMATELY 20 PERSONS PICKETED OUTSIDE THE U.S. FEDERAL BUILDING. THE PROTESTORS CARRIED PLACARDS DENOUNCING THE WAR IN VIETNAM AND THE PAYMENT OF INCOME TAX. THE DEMONSTRATION WAS SPONSORED BY THE VOLUNTOWN, CONN., CHAPTER OF THE NEW ENGLAND COMMITTEE FOR NON-VIOLENT ACTION.

WEDNESDAY, 13 MARCH 1968

BROOKLYN, N.Y.: ABOUT 35 PERSONS PARTICIPATED IN A DEMONSTRATION AT THE MAIN GATE OF FORT HAMILTON TO PROTEST THE SCHEDULED INDUCTION OF PETER BEHR. MANY OF THE PROTESTORS DISTRIBUTED LEAFLETS AND FLOWERS TO PERSONS ENTERING THE FORT. THE DEMONSTRATION LASTED APPROXIMATELY ONE AND ONE HALF HOURS AND ENDED WITHOUT INCIDENT.

COLUMBIA, S.C.: APPROXIMATELY 200 NEGROES FROM ALLEN UNIVERSITY AND BENEDICT COLLEGE IN COLUMBIA JOINED A GROUP OF ABOUT 900 STUDENTS FROM SOUTH CAROLINA STATE COLLEGE (SCSC) AND CLAFLIN COLLEGE, ORANGEBURG, S.C., IN A DEMONSTRATION AT THE STATE CAPITOL BUILDING. THIS PROTEST WAS A CONTINUANCE OF THE DEMONSTRATION HELD BY SCSC STUDENTS AT CAPITOL ON 7 MAR 68 (REFERENCE USA INTC WEEKLY SUMMARY NUMBER 68-11). ABOUT 20 SOUTH CAROLINA STATE PATROLMEN EQUIPPED WITH BATONS, PISTOLS, GAS-MASKS AND STEEL HELMETS WERE ON HAND TO PREVENT ANY VIOLENCE. FOLLOWING AN UNSUCCESSFUL ATTEMPT BY APPROXIMATELY 30 NEGRO DEMONSTRATORS TO ENTER THE STATE CAPITOL, THE ORANGEBURG PROTESTORS RE-BOARDED THIRTEEN CHARTERED BUSES AND RETURNED TO THEIR RESPECTIVE SCHOOLS. DURING THE DEMON-

STRATION ABOUT FIFTEEN NEGROES, INCLUDING JAMES WESTON, SOCIOLOGY PROFESSOR AT SCSC, WERE ADMITTED TO THE GOVERNOR'S OFFICE FOR A BRIEF CONFERENCE. THERE ARE NO DETAILS ABOUT WHAT TOOK PLACE IN HIS OFFICE.

SUNDAY, 17 MARCH 1968:

WASHINGTON, D.C.: A. ABOUT 21 MEMBERS OF AN ORGANIZATION KNOWN AS MOVIMIENTO INSURRECTIONAL DE RECUPERACION REVOLUCIONARIA (MIRR) PARTICIPATED IN A PEACEFUL DEMONSTRATION AT THE WHITE HOUSE. THE DEMONSTRATORS CARRIED PLACARDS WHICH REFLECTED THEIR SUPPORT FOR AMERICAN POLICY IN VIETNAM. (NOTE: THIS GROUP WAS PREVIOUSLY REPORTED AS THE MOVEMENT INSURRECTIONAL RECOOPERATION—MIR. REFERENCE USAINTC WEEKLY SUMMARY NUMBER 68-11).

B. *Covert Infiltration of Social and Political Organizations by Military Intelligence Agents.* Although the plaintiffs were denied an evidentiary hearing in the district court, they were prepared to introduce evidence, through the testimony of witnesses who were in the courtroom when the request for a hearing was denied, that the Army's domestic intelligence gathering was not limited to reports on the public activity of plaintiffs and members of their class, but also extended to covert infiltration by intelligence agents of private social, political and religious groups exercising their freedom of association. Plaintiffs' counsel made

an offer of proof to the district judge that one such witness, Oliver Allen Pierce, who had served in the Fifth Division, Military Intelligence Detachment at Fort Carson, Colorado from May 1, 1969 to December 19, 1969, would testify as follows:

> Mr. Askin: . . . [W]e have a witness who is prepared to testify on the activities of the Army at Fort Carson in Colorado, the Army military intelligence group out there . . .
>
> The Court: Exactly what would he say?
>
> Mr. Askin: Your Honor, he will testify that he was instructed to infiltrate a group known as the Young Adults Project, an organization composed of a number of church groups in the Colorado Springs area which also included the participation of the Young Democratic organization in the Colorado Springs area; that he was instructed to become a member of this group . . . and to make regular reports on what was going on . . . ; that he also was instructed to attend meetings, for example, of the Poverty Program, the Community Action Board in Colorado Springs, make reports on what was said there, who attended, who was doing what, and make regular reports back to the Military Command, which, again, is filed for who knows what future purposes. (Transcript of Proceedings before Judge Hart, April 22, 1970, at pp. 29-30.)

As a supplement to this offer of proof of the testimony of Mr. Pierce, it would be appropriate for the Court to take notice of the testimony in related proceedings[5] by

---

[5] Even for purposes of deciding issues on the merits, this Court has taken notice of legislative committee reports, *Carolene Products*

other present and former military intelligence agents that they had engaged in the penetration of private groups for intelligence purposes during the regular course of their military duties. Such testimony was given during proceedings on plaintiffs' motion for a preliminary injunction in *ACLU* v. *Westmoreland,* 70 Civ. 3191 (N.D. Ill. 1970), appeal docketed *sub nom. ACLU* v. *Laird,* 71 Civ. 1159 (7th Cir. 1971), by Thomas L. Filkins, Director of the Special Operations Section, Region 1, 113th Military Intelligence Group, Evanston, Illinois (Transcript of Proceedings, at pp. 639-40, 810); and John M. O'Brien, former Staff Sergeant, Region 1, 113th Military Intelligence Group (June 1969 to June 1970) (Transcript of Proceedings, at pp. 176-81). Mr. O'Brien also testified about his undercover duties in Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, February 24, 1971, 117 CONG. REC. S7313 (daily ed. May 19, 1971); similar testimony was given in the same hearings by Laurence F. Lane, who served in the Fifth Division Military Intelligence Detachment at Fort Carson, Colorado from December 1968 through June 1970. 117 CONG. REC. S7315-18 (daily ed. May 19, 1971).

C. *Scope of the System.* During the two months between the filing of the complaint on February 17, 1970 and the

---

Co. v. *United States,* 323 U.S. 18, 28 (1944), and matters of public history, *Sparrow* v. *Strong,* 3 Wall. 97 (1866), and may of course take notice of other proceedings within the federal judicial system. In the present case plaintiffs ask the Court to notice such materials only for the purpose of recognizing the necessity of remanding the case for development of a full factual record. See Supreme Court Rule 24(1) providing that a brief in opposition to a writ of certiorari should disclose "any matter or ground why the cause should not be reviewed by this court."

oral argument on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss on April 22, 1970, the scope of the Army's surveillance system was partially revealed through statements made by Army spokesmen under the pressure of Congressional inquiry, this lawsuit, and adverse publicity. In identical letters dated February 25 and 26, 1970 and addressed to more than thirty members of Congress and plaintiffs' counsel (Exhibit A to Speiser Affidavit), Robert E. Jordan III, former Army General Counsel and Assistant to the Secretary of the Army for Civil Functions, acknowledged that "there have been some activities which have been undertaken in the civil disturbance field which, after review, have been determined to be beyond the Army's mission requirements." Mr. Jordan admitted that the Army Intelligence Command maintained a computerized data bank on civilian political activity at Fort Holabird, Maryland, and distributed an "identification list" describing persons and organizations "who might be involved in civil disturbances." Neither the data bank nor the identification list, he stated, were needed by the Army.

Although Mr. Jordan promised that the Fort Holabird computerized data bank would be "discontinued," he made no reference to duplicate information located at other record centers, as described in Exhibit B to plaintiffs' complaint. Because of the inadequacy of Mr. Jordan's letter, Senator Sam J. Ervin, Chairman of the Constitutional Rights Subcommittee of the Senate Committee on the Judiciary, wrote to defendant Resor on February 27, 1970 to request further information about the scope of the Army's surveillance system. (Exhibit D to Speiser Affidavit.) Senators Abraham Ribicoff and William Fulbright and

Congressman Cornelius Gallagher similarly pressed Mr. Jordan for more information. (Exhibits E and G to Speiser Affidavit; Exhibit A to Plaintiffs' Memorandum of Law in Support of their Motion for a Preliminary Injunction.)

To answer mounting Congressional criticism, Under Secretary of the Army Thaddeus Beal wrote to Congressman Gallagher and Senator Ervin on or about March 20, 1970 (Exhibits G and F to Plaintiffs' Memorandum, *supra*). He admitted the existence of a second "identification list" and promised that it would be recalled and destroyed. He acknowledged the maintenance of a third microfilm and data bank by the Counterintelligence Analysis Division, and stated that it would continue to be maintained. Apart from these admissions, however, Mr. Beal chose to ignore the comprehensive inquiry addressed to him and Mr. Jordan by members of Congress, as well as the bulk of the allegations contained in Exhibit B to the plaintiffs' complaint. By the time their request for a hearing on their motion for a preliminary injunction was denied, therefore, the plaintiffs had reason to believe that the Army was concealing the existence of:

(1) a large microfilm data bank on civilian political activity indexed by computer and maintained by the Counterintelligence Analysis Division (CIAD) of the Office of the Army Assistant Chief of Staff for Intelligence;

(2) a second computerized domestic intelligence data bank maintained by the Continental Army Command at Fort Monroe, Virginia;

(3) extensive regional files maintained by the G-2s of the First, Third, Fourth, Fifth, and Sixth Armies, and the Military District of Washington;

(4) extensive regional files maintained by the 108th, 109th, 111th, 112th, 113th, 115th, and 116th Military Intelligence Groups and the 710th Military Intelligence Detachment, at Fort Devens, Massachusetts; Fort Meade, Maryland; Fort McPherson, Georgia; Fort Sam Houston, Texas; Fort Sheridan, Illinois; San Francisco, California; and Honolulu, Hawaii, respectively;

(5) cards and documents stored at the U.S. Army Intelligence Command's Headquarters from which the Command's computerized data bank was organized and made operable;

(6) a second blacklist, much larger than the first, popularly known as the "Compendium" and published by the Counterintelligence Analysis Division as a two-volume, yellow covered, looseleaf publication entitled, *Counterintelligence Research Project: Organizations and Cities of Interest and Individuals of Interest,* which describes numerous individuals and organizations unassociated with the armed forces;

(7) other publications, including monthly intelligence summaries published by each of the stateside Army commands, which describe individuals and organizations active in lawful political protests of no concern to the Army.

WHY THE WRIT SHOULD BE DENIED

I.

The Incomplete Record in This Case and the Lack of Finality of the Judgment Below Require That the Petition for a Writ of Certiorari Be Denied.

This case is not ripe for review by the Supreme Court. Although the plaintiffs are seeking extraordinary injunctive relief against the military arm of the executive, they have had no opportunity to build a factual record upon which to substantiate the allegations in their complaint. On April 22, 1970, the plaintiffs appeared before the District Court for an evidentiary hearing on their motion for a preliminary injunction, but their request to proceed with witnesses and documentary evidence was denied by the court. After oral argument the district judge denied plaintiffs' motion for injunctive relief, and granted the defendants' cross motion to dismiss the complaint. On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of the District Court—which had the effect of nullifying the plaintiffs' lawsuit in the trial court before it had begun—was reversed and the case remanded for the evidentiary hearing the plaintiffs had originally sought. In explaining the remand order, Judge Wilkey pointed out that "the record now before us is much too incomplete for a court to determine the ultimate questions" in the case (App. A, at 34). It is this same incomplete record that the government asks this Court to review.

The practice of the Supreme Court not to grant certiorari to review a nonfinal judgment, "such as one remanding the

case to the district court for a new trial," Stern and Gressman, SUPREME COURT PRACTICE 180 (4th ed. 1969), should be followed in this case. The sufficiency of plaintiffs' claim as a cause of action cannot be demonstrated without a full hearing [see II, *infra*], and this Court cannot decide the important issues presented without a full record before it. Indeed, the Court has warned that "summary procedures, however salutary . . . present a treacherous record for deciding issues of far-flung import." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948). Accordingly, this case lacks finality, and that fact "of itself alone furnishe[s] sufficient ground for the denial [of certiorari]." *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *American Construction Company* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

The government's petition for certiorari invites the Court to consider important constitutional questions with a wholly inadequate factual record which fails to portray in sufficient detail the concrete setting of the constitutional claims. Cf. *Kennedy* v. *Silas Mason Co.*, *supra*. Were certiorari to be granted, it is likely that the Court would dismiss the writ after oral argument as improvidently granted, since "the record relevant to the constitutional claims . . . is insufficient to permit decision." *Johnson* v. *Massachusetts*, 390 U.S. 511 (1968). See also *Wainwright* v. *New Orleans*, 392 U.S. 598 (1968); *Massachusetts* v. *Painten*, 389 U.S. 560, 561 (1968) ("the record is not sufficiently clear and specific to permit decision of the

important constitutional questions involved"). That disposition would be wasteful of judicial time, contrary to the purpose of review, and prejudicial to plaintiffs' interests in having their claims fairly litigated. To hear the case at this premature stage would be to repeat the experience suffered by plaintiffs in *Board of Education* v. *Allen*, 392 U.S. 236, 248 (1968), another case of major constitutional dimension which reached the Court after summary proceedings below:[6]

> *Against this background of judgment and experience, unchallenged by the meager record before us in this case,* we cannot agree with appellants . . . . *This case comes to us after summary judgment entered on the pleadings.* Nothing in this record supports the proposition that all textbooks . . . are used by the parochial schools to teach religion . . . . [Accordingly], *we are unable to hold, based solely on judicial notice,* that this statute results in unconstitutional involvement of the State with religious instruction. [Emphasis supplied.]

II.

In Addition to the Fact That the Record Is Inadequate to Warrant a Grant of Certiorari, the Court Below Was Correct in Concluding That Plaintiffs' Claim Was Justiciable and That Plaintiffs Had the Requisite Standing to Sue.

A. *Plaintiffs' Claim Is Justiciable*

The rules of justiciability subsumed under Article III of the Constitution require a court to decide " 'whether the

[6] In *Allen*, the plaintiffs themselves were responsible for the inadequacy of the record. In the case at bar, the plaintiffs want a trial so that the facts may be fully developed.

facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant 'the issuance of'" judicial relief, *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969), quoting from *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

The considerations bearing on justiciability have been modified in the First Amendment area. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). This occurs notably in situations where governmental practices exert broadside pressures against First Amendment activities, but without the application of formal sanctions against particular persons. Under these circumstances ". . . a plaintiff need not [and often cannot] invariably wait until he has been successfully prosecuted, dismissed, denied a license, or otherwise directly subjected to the force of a law or policy before he may challenge it in court." *NSA* v. *Hershey*, 412 F.2d 1103, 1110 (D.C. Cir. 1969); cf. *Dombrowski* v. *Pfister, supra; Reed Enterprises* v. *Corcoran*, 354 F.2d 519, 523-24 (D.C. Cir. 1965). Consequently, ". . . suits alleging injury in the form of a chilling effect may be more readily justiciable than comparable suits not so affected with First Amendment interests." *NSA* v. *Hershey*, *supra* at 1123. See also *Reed Enterprises* v. *Corcoran*, *supra* at 523. The instant case arises well within the parameter of First Amendment justiciability, since the plaintiffs are not complaining about a potentiality but rather about the *actual* and *current* application of the Army's surveillance practices.[7] The government has consistently

[7] The Government in the court below placed great emphasis on language in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 92

failed to address itself to the complaint,[8] which the Court of Appeals characterized as follows:

> [A]ppellants contend that the *present existence of this system* of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a *present inhibiting effect* on their full expression and utilization of their First Amendment rights of free speech. The baleful effect, if there is one, is thus a present inhibition of lawful behavior and of First Amendment rights. "The peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interest if he *does not* speak or act as he says he wants to." *National Student Association* v. *Hershey*, 134 U.S. App. D.C. 56, 64, 412 F.2d 1103, 1111 (1969). If the Army's intelligence system causes such injury it may be en-

---

(1947), that when a plaintiff is faced with the mere possibility of adverse action his suit will not be justiciable unless it "meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights . . . ." In repeating the substance of this language in its petition for certiorari, the Government apparently does not recognize that this Court has held that the *actual application* of an overbroad policy, such as the Army's surveillance system, which affects freedom of expression, meets the *Mitchell* requirement, notwithstanding the fact that the policy carries with it no penalty beyond its inhibiting effect. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). In some cases even the *mere threat* of enforcement of such a policy, e.g., *NSA* v. *Hershey*, 412 F.2d 1103 (D.C. Cir. 1969), has been held sufficient to overcome the limiting language in *Mitchell*.

[8] Which, on the Government's motion to dismiss, must be taken as true. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 126 (1951).

> joined if the system in operation exceeds the authority granted by Congress, see *Kent* v. *Dulles*, 357 U.S. 116 (1958) . . . or, if within its statutory authority, it nevertheless creates more than an 'incidental' burden on First Amendment rights, and thus violates the Constitution. See *United States* v. *O'Brien*, 391 U.S. 376 (1968). (App. A, p. 25, n. 16.) [Emphasis in original.]

In dwelling in its petition upon the "threat of the unknown" and the possibility of future misuse of the fruits of surveillance, the government hopes to obscure the immediacy of the burdens on speech and assembly alleged in the complaint.* But it is precisely because of the immediacy of the threat posed by the Army's surveillance that the plaintiffs' suit is ready for trial; to await further events as suggested by the government would not make the suit more ripe but would only increase the injury to plaintiffs' constitutional rights. Cf. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925). Unlike other First Amendment cases which were held to be justiciable even though there existed, however attenuated, some possibility for a court to consider the critical constitutional issues presented when raised in defense to a criminal prosecution, e.g., *Dombrowski* v. *Pfister*, *supra*; *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967);

---

* In related contexts, this Court has held that the chilling effect of statutes banning anonymous advocacy, *Talley* v. *California*, 362 U.S. 60 (1960), or requiring affirmative disclosure of membership, or affiliation, *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958), arises not merely from the possibility that public officials will misuse the information revealed, but rather from the immediate and sometimes irrational fear of private reprisals and community pressure, which is not always susceptible to precise proof.

NSA v. *Hershey, supra,* there is no foreseeable or realistic prospect of later judicial intervention to safeguard the rights which have been and are continuing to be abridged in the case at bar.[10]

The government suggests that the Court "await a case presenting concrete evidence of unlawful inhibitory action by the military, or a real threat of misuse of information; the issues should not now be adjudicated on this record

---

[10] The government, in its petition at p. 8, n. 3, contends that a directive from the Secretary of the Army to the Chief of Staff on March 6, 1970 which purported to limit the "intelligence activities complained of in the present case and directed the personnel responsible to concentrate on the more important and likely sources and locales of violence"—has rendered this case moot. This assertion is baseless for two reasons. First, as Judge Wilkey observed in dismissing the same argument made by the government in the court below, "[i]f the Secretary of the Army can formulate and implement such judgment based on facts within his Departmental knowledge, the United States District Court can hear evidence, ascertain the facts, and decide what, if any, further restrictions on the complained-of activities are called for to confine the military to their legitimate sphere of activity and to protect appellants' allegedly infringed constitutional rights" (App. A, p. 34). Second, the evidence which the plaintiffs will introduce upon remand to the district court will prove that the Army's domestic intelligence system has continued to operate beyond any reasonable necessity since the institution of this lawsuit, notwithstanding any directive to the contrary from the Secretary. For example, plaintiffs are in possession of documentary intelligence reports for the Minneapolis-St. Paul area, similar to those in Exhibit A to the Complaint, *supra* at pp. 6-9, entitled "Intelligence Summary for the Week of 19-23 Oct 1970" (also "2-6 Nov 1970" and "9-13 Nov 1970) and "obtained through contact with the . . . 113th Military Intelligence Group," as well as local, state and federal law enforcement agencies. A typical report reads as follows:

> A peace demonstration march is scheduled in Minneapolis on October 31st. The march is to begin at 12:00 noon beginning at two points, the University of Minnesota campus and Lake Harriet, and is to terminate at Loring Park in downtown Minneapolis. The event is reportedly sponsored by the Minnesota Peace Action Council.

which presents only abstract legal issues involving, at best, the speculative impairment of constitutional rights." (Petition, p. 10, n. 4.) This argument must be rejected for two reasons. First, the reason that the case "presents only abstract legal issues" is because of the government's motion to dismiss. If the government had not contested plaintiffs' desire to go to trial in the district court, there would be an evidentiary record in this case to give the Court the perspective necessary to adjudicate the serious constitutional issues. Second, the suggestion that the Court await "a real threat of misuse of information" is to urge upon the Court the peculiar doctrine that constitutional violations must reach epidemic proportion before becoming justiciable. The fact is that "a delay in adjudication holds no promise of 'a better case'." *NSA* v. *Hershey, supra* at 1119.

The Government compounds its misunderstanding of the complaint by contending that plaintiffs do not allege any specific injury to themselves. This Court has consistently held that a challenge to governmental action which inhibits protected speech is justiciable even though the injury complained of is the intimidation itself and not any tangible sanction or penalty. See, e.g., *Lamont* v. *Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) ("... inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. ... [W]e cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one."); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *Talley* v. *California*, 362 U.S. 60, 65 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958); see also *Wolff* v. *Selective Service Local Board No. 16, supra; Hentoff* v. *Ichord*,

318 F. Supp. 1175 (D.D.C. 1970); *Straut* v. *Calissi*, 293 F. Supp. 1339 (D.N.J. 1968); *Local 309, United Furniture Workers of America* v. *Gates*, 75 F. Supp. 620, 624 (N.D. Ind. 1948). See generally Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969). For the Court to hold otherwise would establish the dangerous principle that governmental activity which seriously damages First Amendment interests but causes no other identifiable injury is not amenable to judicial control. Such a principle has been expressly rejected by the Court. Compare *Lamont* v. *Postmaster General*, 381 U.S. 301, 307 (1965), with *Bee See Books, Inc.* v. *Leary*, 291 F. Supp. 622, 627 (S.D.N.Y. 1968).

Since the complaint is of sufficient "immediacy and reality" to be justiciable under First Amendment standards, the government's contention that the separation of powers doctrine precludes resolution of the merits of the case must also fall. Although "one branch of the government may not lightly interfere with the exercise of its legitimate power by a coordinate branch," *Davis* v. *Ichord*, 442 F.2d 1207, 1213 (D.C. Cir. 1970), this admonition does not extend to cases where preferred constitutional rights are alleged to be infringed by a branch of government acting beyond the scope of its authority. *Powell* v. *McCormack*, 395 U.S. 486, 548-49 (1969). See also *United States* v. *Robel*, 389 U.S. 258, 263-64, 267-68 (1967); *Stamler* v. *Willis*, 415 F.2d 1365, 1369-70 (D.C. Cir. 1969) *cert. denied, sub nom. Ichord* v. *Stamler*, 399 U.S. 929 (1970).

B. *The Plaintiffs Have Standing to Sue*

1. *Plaintiffs Have Standing to Sue Because Their First Amendment Rights Are Abridged.* The rules of standing applied by the federal courts have been fashioned with reference to the status of the party whose standing is challenged and the type of complaint he has alleged. Thus, a court "must look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). Under broadened principles of standing to raise First Amendment issues, *Flast* v. *Cohen, supra; NSA* v. *Hershey, supra; Wolff* v. *Selective Service Local Board No. 16, supra,* the requisite nexus between the plaintiff's status and his claim is his "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), and it is this demonstrated nexus which makes his allegation of injury sufficient to give the plaintiff standing to sue.[11]

---

[11] This Court has relaxed the standing requirement in public actions. *Flast* v. *Cohen, supra.* There is also considerable support for the position that the English practice underlying constitutional standing theory "did not in fact demand injury to a personal interest as a prerequisite to attacks on jurisdictional excesses, and that neither the separation of powers nor advisory opinion doctrines as originally envisaged require insistence on a personal stake as the basic element of standing to make such challenges." Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 817-18 (1969). See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 451, 498 (March 1966); cf. *Wadsworth* v. *Queen of Spain* [1851] 17 Q.B. 171, 214 ("we find it laid down in books of the highest authority that, where the court to which prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as of the defendant himself. 2 COKE 607; *Com. Dig. Prohibition* (E)." (Campbell, L. J.).). While the

"A chilling effect which amounts to a justiciable injury confers standing to challenge the source of the chill on any person who plausibly alleges that he is chilled." *NSA* v. *Hershey, supra,* at 1119, n. 46. As attested by Judge Wilkey's opinion below, the plaintiffs have "plausibly argued" that their status as civilians attempting to engage in protected First Amendment activity gives them standing to complain that First Amendment interests are concretely abridged by the overbroad domestic surveillance system of the Army:

> If the Army's system does indeed derogate First Amendment values, the appellants are persons who are sufficiently affected to permit their complaint to be heard. The record shows that most if not all of the appellants and/or the organizations of which they are members have been the subject of Army surveillance reports and their names have appeared in the Army's records. Since this is precisely the injury of which appellants complain, they have standing to seek redress for that alleged injury in court and will provide the necessary adversary interest that is required by the standing doctrine, on the issue of whether the actions complained of do in fact inhibit the exercise of First Amendment rights. Nor should the fact that these particular persons are sufficiently uninhibited to bring this suit be any ground for objecting to their standing. See *NAACP* v. *Alabama,* 357 U.S. 449, 459 (1958); *Anderson* v. *Sills,* 56 N.J. 210, 265 A.2d 678, 684 (1970). (App. A, p. 26, n. 17).

---

plaintiffs do not feel it necessary to take this position because they meet the requirements of *Flast* v. *Cohen, supra,* it underscores the lack of merit in the Government's contention that the plaintiffs lack standing to sue.

Without expressing any opinion as to the ultimate issue of proof, therefore, the court below properly concluded that "it is the operation of the system itself which is the breach of the Army's duty toward appellants and other civilians." (App. A, pp. 25-27).

The plausibility of the claim that plaintiffs and their class have been chilled is enhanced by two factors overlooked by the government in its petition. First, the complaint alleges that the Army's publicized surveillance of the plaintiffs and collection of dossier information about their activities has an inhibiting effect on other civilians who might associate with them, and consequently abridges their freedom of association. This Court has repeatedly held in an analogous context that government investigative activity which compels disclosure of the membership lists of organizations or the associational ties and activities of individuals can have a chilling effect on free association. See, e.g., *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama, supra; Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957). The effect of such investigation, when it becomes widely known, can result in public harassment of unpopular groups or individuals, and, in some instances, imposition of a stamp of disloyalty. See *Sweezy* v. *New Hampshire, supra,* at 248. Freedom of association, therefore, is chilled both when investigative disclosure leads to informal repression of the opinions of those exposed due to public hostility, *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293 (1961); *NAACP* v. *Alabama, supra,* at 462-63, and when the threat of such disclosure and harassment leads members to refuse to renew organizational ties and dissuades others from joining. *Bates* v. *City of Little Rock, supra,* at 524.

Second, one of the main functions of the chilling effect doctrine is to permit a claimant to vindicate the First Amendment rights of those who are not parties before the court precisely because they are inhibited by the challenged practice. In this case, the Army's surveillance system imposes a burden on the exercise of First Amendment rights which has an "inhibiting effect [on] the flow of democratic expression and controversy upon those directly affected and those touched more subtly." *Sweezy* v. *New Hampshire,* 354 U.S. 234, 248 (1957). As the Court said in *NAACP* v. *Button, supra,* at 432, "in appraising a [practice's] inhibitory effect upon such [First Amendment] rights, this Court has not hesitated to take into account possible applications of the [practice] in other factual contexts besides that at bar. *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98; *Winters* v. *New York,* 333 U.S. 507, 518-20. Cf. *Staub* v. *Baxley,* 355 U.S. 313." [12]

Finally, the question of standing must often abide production of evidence below. As Mr. Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* at 152, speaking of the necessary "injury" or "controversy" which confers standing on a party, "[t]hese terms have meaning only when contained by the facts to which they have been applied." For that reason alone, certiorari must be denied in this case so that the plaintiffs may have the opportunity, so far denied to them, to produce all the

[12] In *Anderson* v. *Sills,* 56 N.J. 210, 221, 265 A.2d 678 (1970), a case involving surveillance of constitutionally protected activity by New Jersey State officials, the New Jersey Supreme Court in face of a claim that plaintiffs there had no standing, said " . . . there is good reason to permit the strong to speak for the weak or the timid in First Amendment matters." Cf. *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Straut* v. *Calissi,* 293 F. Supp. 1339, 1342 n. 8 (D.N.J. 1968).

available evidence so that they can show the extent of the illegal government action and its impact upon the plaintiffs and the class they represent, and consequentially demonstrate in concrete factual terms the quality of their standing.

2. *Plaintiffs Have Standing to Sue Because the Department of the Army Has Exceeded Its Authority in Developing an Overbroad Domestic Surveillance System.* "[S]tanding to challenge official action is more apt to exist when that action is not within the scope of official authority than when the objection to the administrative decision goes only to its correctness." *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* at 156 (Frankfurter, J., concurring). In this case, plaintiffs specifically alleged that the military surveillance program "exceeds the lawful needs and authority of the United States Army and is without any lawful statutory authority." (complaint ¶18).

The government argued in the courts below that the Army surveillance system is based on the statutory authority of 10 U.S.C., sections 331, 332, 333, and 334 which provide for the domestic use of the armed forces by the President "to enforce the laws of the United States"[13] or "suppress insurrection"[14] when local and state authorities can no longer do so themselves. These statutes contain no reference to lawful political activity and do not contemplate the surveillance and maintenance of dossiers on individuals engaged in such activity by agents under the control of the Army.[15] Indeed, since protection of the

[13] 10 U.S.C. §332.

[14] 10 U.S.C. §333.

[15] 18 U.S.C. §§592 and 593, in fact, make it a criminal offense for officers and members of the armed forces to interfere with elections, including "intimidation" of voters.

political freedom of citizens and organizations forms the very essence of constitutional liberty and security, *Bates* v. *City of Little Rock, supra; NAACP* v. *Alabama, supra;* it is difficult to imagine any construction that would do more violence to the statutory language than the one urged by the Government. That the executive has a statutory authority to combat *illegal overt acts* amounting to "insurrection" [16] *after* the failure of civilian authority, does not mean that the Army can institute a program of domestic surveillance which, the evidence on remand will show, has become a "dragnet which may enmesh anyone." *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937).

Any doubt that the Army's statutory domestic mission does not authorize military spying on civilian politics is put to rest by *Schneider* v. *Smith,* 390 U.S. 17, 25-27 (1968). In that case the Court rejected the contention advanced by the government that the Magnuson Act [50 U.S.C., §191(b)] empowering the President to "safeguard vessels against destruction, loss or injury from sabotage or other subversive acts," allowed him to promulgate regulations authorizing the Coast Guard Commandant to gather information about the political beliefs and associations of merchant seamen. The Court held that the statute did not contemplate such sweeping investigation. The Court concluded that since "the purpose of the Constitution and Bill of Rights was to take government off the backs of the people, . . . the right peaceably to assemble and to petition, and the associational freedom that goes with those

[16] Cases arising under the predecessor statute to 10 U.S.C., §333 construed "insurrection" as "a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state." *In Re Charge to Grand Jury,* 62 F. 828, 830 (D. Ill. 1894). See also *Presser* v. *Illinois,* 116 U.S. 252 (1886).

rights, create a preserve where the views of the individual are made inviolate." 390 U.S. at 25-26. See also *Cole* v. *Young*, 351 U.S. 536 (1955) (Executive Order aimed at "insuring the 'unswerving loyalty' of all [government] employees, regardless of position" held to exceed authority delegated to executive by statute relating to national security).

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

FRANK ASKIN
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

MELVIN L. WULF
American Civil Liberties
Union Foundation
156—5th Avenue
New York, N. Y. 10010

HOPE EASTMAN
1424—16th Street, N.W.
Washington, D. C. 20036

Attorneys for Respondents

October 15, 1971

Respondents' attorneys gratefully acknowledge the assistance of John Shattuck, LL.B., Yale Law School, 1970, and of Norman Buntaine, Steven Riskin and Tamara Benamy, of the Constitutional Litigation Clinic of Rutgers Law School, in the preparation of this brief.